86-926

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

TIMOTHY ELING, et al,

Petitioners,

vs.

C. PAUL JONES, MINNESOTA CHIEF PUBLIC DEFENDER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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HHPP

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TO The Honorables, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Timothy Eling, Paul C. Johnson, and Anthony Dent, on behalf of themselves and all others similarly situated, respectfully request that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered on August 8, 1986.

QUESTION PRESENTED FOR REVIEW

Whether appellant inmates' 1983 action was properly dismissed against the state public defender for failure to assert state action where the state public defender in his administrative capacity invoked a policy of refusing to return the inmates' trial transcripts to them when all appellant and post conviction work is completed by the state public defender's office.

PARTIES TO THE PROCEEDING

The following persons are inmates in Minnesota Correctional facilities and as petitioners are seeking review of the lower court's judgment on behalf of themselves and others similarly situated:

Timothy Eling

Paul C. Johnson

Anthony Dent

Respondent C. Paul Jones, is the Minnesota Public Defender.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, whose judgment is sought to be reviewed, is reported at 797 F.2d 697 and is reprinted in Appendix A. The prior opinion of the United States District Court for the District of Minnesota is reprinted in Appendix B.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was filed on August 8, 1986. Appendix A. A timely petition for rehearing was denied on September 8, 1986 (Appendix C), and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked under Title 28 United States Code Section 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides:

> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
>
> Amendment XIV: " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 42 United States Code Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioners brought an action in the federal court for the District of Minnesota, alleging violations of their constitutional rights, under Title 42 United States Code Section 1983. Federal jurisdiction was invoked under Title 28 United States Code Sections 1331 and 1343.

Petitioners are inmates who were represented by assistant state public defenders at trial and upon appeal of their convictions. Following affirmance of their convictions and after receiving notice from the state public defender's office that no further work could be pursued on their behalf, the inmates requested their trial transcripts. Respondent, Chief State Public Defender, typically

responded, "we have no property which belongs to you" and denied the inmates' requests for their transcripts.

Petitioners alleged in their complaint that they were denied effective assistance of counsel protected by the Sixth Amendment and equal protection guaranteed by the Fourteenth Amendment. Petitioners alleged that the chief public defender breached his duty to provide them effective assistance of counsel by thwarting rather than facilitating their efforts to secure their transcripts. Further petitioners demonstrated to the federal district court that petitioners who were represented by assistant public defenders were receiving different treatment than others convicted in the State of Minnesota who were represented

by private counsel. Petitioners sought declaratory and injunctive relief. The issue of the alleged constitutional violations was not reached in either the district or circuit court because the lower courts found that petitioners had not established that respondent acted under color of state law.

The issue is whether the chief state public defender is acting under color of state law in making the policy decision that the inmates are not entitled to their transcripts.

The district court for the District of Minnesota, the Honorable Donald D. Alsop, granted respondent's motion for summary judgment upon a finding that petitioners had not established that respondent was acting under color of state law. Although the district court acknowledged that public

defenders may be liable for acts committed under state law (Tower v. Glover, 467 U.S. 914 (1984)), the district court found that the chief state public defender was performing "a lawyer's traditional function" when denying petitioners and others their transcripts and therefore respondent was not acting under color of state law. The district court relied upon Polk County v. Dodson, 454 U.S. 312 (1981) in granting respondent summary judgment.

The district court made no distinction between the functions performed by the assistant public defenders who authored petitioners' appellant briefs and the chief public defender who wrote the letters and establishing the policy that the petitioner inmates' requests for their

transcripts are to be denied.

The Eighth Circuit Court of Appeals agreed with the lower court that Minnesota's chief public defender was dealing with petitioners as clients, thus performing a lawyer's traditional function. The Eighth Circuit Court of Appeals affirmed the district court's decision and agreed that Polk County v. Dodson, 454 U.S. 312 (1981) was controlling.

The Circuit Court found Tower v. Glover, 467 U.S. 914 (1984) inapposite because petitioners did not allege that respondent conspired with any other state officials to deprive them of their transcripts.

The Circuit Court acknowledged that in Branti v. Finkel, 445 U.S. 507 (1980) this Court found a public defender liable under Title 42 United

States Code Section 1983 where the chief public defender made administrative decisions regarding hiring and firing which deprived appellants due process as protected by the federal constitution. The Circuit Court did not distinguish Branti from the facts presented by these petitioners.

Petitioners assert that the lower courts erred in finding that the Minnesota public defender, who is an administrator and head of a state agency under Minnesota law, performed a lawyer's traditional function with respect to these petitioners. Minimally, material facts as to the chief public defender's role and duties were in dispute and summary judgment was improper.

Petitioners urge this Court to

grant certiorari, reverse the Circuit Court and find that a state public defender, while performing administrative duties, may be liable under Title 42 United States Code Section 1983 without conspiring with other state officials.

REASONS FOR GRANTING WRIT

Certiorari should be granted to clarify the circumstances under which a public defender may be held liable under Section 1983 for deprivation of an individual's constitutional rights and whether a conspiracy must be alleged in order for a public defender to be held liable for administrative decisions. Furthermore review should be granted because the Circuit Court sanctioned the district court's action of granting summary judgment when

material facts are in dispute.

A. SUMMARY JUDGMENT WAS IMPROPERLY ENTERED WITH MATERIAL FACTS IN DISPUTE

Summary judgment pursuant to Rule 56 Federal Rules of Civil Procedure is not appropriate when material facts are in dispute. The district court found that respondent, Minnesota State Public Defender, was performing a lawyer's traditional function when he declined to return transcripts to former clients of the public defender's office once all appellant and post-conviction work was completed. The lower court ignored the fact that the three named petitioners were represented by three different assistant public defenders on appeal of their convictions. These assistant public defenders clearly performed the lawyer's traditional function for the

individual petitioners.

Respondent on the other hand is the head of a state agency. Minnesota Statute Section 611.22 provides that "The office of state public defender, under the control and supervision of the state public defender, is hereby created and established as an agency of the government." Minnesota Statute Section 611.23 provides for the appointment of the state public defender by the state board of public defense and Section 611.24 confers authority upon the state public defender to "employ or retain assistant state public defenders and other personnel as may be necessary to discharge the function of the office." Minn. Stat. § 611.24.

In view of respondent's statutorily created position and the

administrative duties associated with the position as state public defender, the district court erroneously found as a matter of fact that respondent performed a lawyer's traditional function and therefore was immune from liability under Title 42 United States Code Section 1983.

B. PUBLIC DEFENDERS CAN BE LIABLE IN 1983 ACTIONS FOR ADMINISTRATIVE AND POLICY DECISIONS

This Court in Polk County v. Dodson, 454 U.S. 312 (1981) held that an Iowa inmate failed to state a cause of action under Section 1983 for violation of his right to effective assistance of counsel against his court-appointed appellate lawyer. This court found that the court-appointed lawyer was performing a lawyer's traditional function and not acting under color of state law when she

exercised independent professional judgment and petitioned to withdraw from Dodson's case on appeal after determining that the appeal was frivolous. 454 U.S. at 325. The Dodson decision recognized that public defenders may act under color of state law, however, while performing certain administrative functions. Id.

Indeed in Branti v. Finkel, 445 U.S. 507 (1980), the newly appointed chief county public defender was found liable under Section 1983 for improperly discharging two assistants because of their political affiliations. In Branti, the chief county public defender was not performing a lawyer's traditional function. Similarly in this case respondent C. Paul Jones was performing an administrative, not a lawyering

function, when he decided that his office would retain all trial transcripts rather than return them to the clients at the conclusion of all appellate and post-conviction work.

The policy decision not to return trial transcripts to the inmates was made when respondent was exercising power possessed by virtue of state law and made possible only because he is clothed with the authority of state law according to Minnesota Statute Section 611.22 which states, "The office of state public defender, under the control and supervision of the state public defender, is hereby created and established as an agency of government."

In United States v. Classic, 313 U.S. 299 (1941) this Court held that a person acts under color of state law only when exercising power possessed by

virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. Id at 326. Respondent's blanket policy to retain trial transcripts in storage rather than return them to the indigent clients was clearly made possible only because respondent is acting under color of state law.

C. PUBLIC DEFENDERS' LIABILITY UNDER SECTION 1983 NEED NOT BE PREDICATED UPON A CONSPIRACY

The Eighth Circuit Court of Appeals implied that Tower v. Glover, 467 U.S. 527 (1981) was inapplicable because petitioners did not allege a conspiracy. In Tower this Court reversed a decision of the Ninth Circuit Court of Appeals and held that public defenders may be held liable under Title 42 United States Code

Section 1983 for intentional misconduct under color of state law which deprives complainants of constitutional rights by virtue of an alleged conspiracy with other state officials.

The Eighth Circuit Court interpreted Tower too narrowly when implicitly finding that the lack of an alleged conspiracy in this case rendered petitioners' claims deficient under Section 1983.

The Eighth Circuit Court ignored the teachings of Dodson that a public defender "would act under color of state law while performing certain administrative and possibly investigative functions." 454 U.S. at 325 (emphasis added).

According to Dodson, public defenders do not act under color of state law while performing a lawyer's

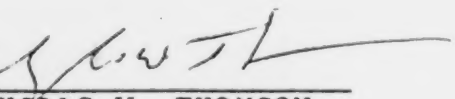
traditional function. However, between the performance of a lawyer's traditional function on a case by case, client by client basis (Dodson) and conspiracy (Tower) a myriad of other administrative, or non-lawyering actions could result in deprivation of an individual's constitutional rights under color of state law. See eg. Branti v. Finkel, 445 U.S. 507 (1980). Particularly where, as here, the public defender had no direct contact with the complainants but acted as an administrator: the head of a large state agency.

CONCLUSION

Based on the foregoing, petitioners urge this Court to grant their petition for writ of certiorari.

Respectfully submitted,

THOMSON, HAWKINS & ELLIS

By 
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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 85-5353

Timothy Eling, et al.,	*	
	*	
Appellants,	*	
	*	
v.	*	Appeal from the
	*	United States District
C. Paul Jones,	*	Court for the District
Minnesota Public	*	of Minnesota
Defender,	*	
	*	
Appellee.	*	

Submitted: June 10, 1986

Filed: August 8, 1986

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and STROM,* District Judge.

STROM, District Judge.

The appellants appeal, on behalf of themselves and others similarly situated, from the order of the United States District Court for the District of Minnesota granting summary judgment against them.

Appellants, indigent prisoners incarcerated in Minnesota, were represented by the Minnesota State Public Defender's Office on trial and appeal of state court convictions. They allege that they were deprived of constitutional rights arising under the Sixth and Fourteenth Amendments by the refusal of the Public Defender's office to furnish copies of their transcripts to them without cost. The district court found appellants' action was subject to dismissal for lack of state action. We affirm.

---

*The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

I. BACKGROUND

Appellants filed this action against C. Paul Jones, Public Defender, and the State of Minnesota, pursuant to 42 U.S.C. § 1983. They sought declaratory and injunctive relief for deprivation under color of state law of their Sixth Amendment right to adequate assistance of counsel, and Fourteenth Amendment right to equal protection. Appellants were represented by the Public Defender's Office at trial and on appeal of their respective criminal prosecutions. They allege that they requested access to their transcripts prior to preparation by the Public Defender's office of their briefs on appeal and also requested copies of their transcripts after decision on appeal. The Public Defender's office refused to provide copies of the transcripts.

Appellee filed a motion for summary judgment pursuant to Fed.R.Civ.P. 56, asserting that requisite state action is lacking.

The district court found that a public defender does not act "under color of state law" when he or she is performing a lawyer's traditional function as counsel to an indigent defendant in a state criminal proceeding. The district court cited Polk County v. Dodson, 454 U.S. 312, 318-19 (1981), as controlling. This appeal followed.

The district court also dismissed the State of Minnesota, finding that there were no allegations on which to base liability against the State of Minnesota that were separate from those against the public defender. Appellants do not appeal from the summary judgment order dismissing the State of Minnesota.

II. Issues

A. State Action

Appellants argue that in denying requests for copies of transcripts, the public defender is performing an administrative function as opposed to a "lawyer's traditional function" and

that thus his acts constitute state action. Conduct "under color of state law" is an essential element of an action under 42 U.S.C. § 1983. Parratt v. Taylor, 451 U.S. 527, 535 (1981). Appellants assert that the district court failed to give proper consideration to the cases of Tower v. Glover, 467 U.S. 914 (1984); and Branti v. Finkel, 445 U.S. 507 (1980), wherein public defenders have been held liable under § 1983.

In Tower v. Glover, 467 U.S. at 914, the Supreme Court held only that "an otherwise private person acts 'under color of' state law when engaged in a conspiracy with state officials to deprive another of federal rights." There are no allegations of any such conspiracy in the present case. The case of Branti v. Finkel, 445 U.S. 507, involved an action brought by an attorney employed by the public defender who was discharged for his political beliefs. The Court found that a

public defender acted on behalf of the state when making hiring and firing decisions.

In contrast, the actions by the Public Defender herein were taken in his capacity as an attorney; the Public Defender was dealing with appellants as clients. The relationship between appellants and the public defender is that of attorney/client, not employer/employee. The uncontroverted evidence clearly shows that the Public Defender exercised a certain amount of discretion and used professional judgment in deciding not to order copies of the transcripts. Such an exercise of "independent professional judgment in a criminal proceeding" brings the present case squarely within the Supreme Court's holding in Polk v. Dodson, 454 U.S. at 324.

Appellants also urge the present case is more closely analogous to the cases of Estelle v. Gamble, 429 U.S. 97 (1976) and O'Conner v. Pachtman, 422 U.S. 563 (1975) than to Polk

County v. Dodson. Those cases involved state employed doctors who were held liable under § 1983 for custodial and supervisory functions. The cases were adequately distinguised in Polk, 454 U.S. at 320. The same distinctions apply here and need not be discussed.

B. Right to Transcript

The Public Defender contends, as an alternative ground for affirmance, that appellants have no constitutional right to copies of their transcripts. The district court did not reach the issue, nor is it addressed in appellant's brief. In light of our holding that requisite state action is lacking, we need not resolve that issue.

However, it is certainly true that in many cases an indigent has a constitutional right to access to his transcript. See Thompson v. Housewright, 741 F.2d 213, 215 (8th Cir. 1984). The United States Supreme Court has held that a

state may not confide to a public defender the final decision as to whether a transcript shall be available to a criminal defendant who collaterally attacks his conviction. Lane v. Brown, 372 U.S. 477, 485 (1963). While we have found the decision to not furnish a transcript falls within the attorney/client relationship and, therefore, does not constitute state action, nevertheless, the court believes the policy of the public defender's office should be reviewed and reconsidered in the light of this court's holding in Thompson.

In summary, we do not mean, by our holding today, to sanction the actions of the Public Defender and other state officials in this case. We hold only that the refusal of the public defender's office to furnish free copies of transcripts to indigents does not state a claim under 42 U.S.C. § 1983.

In view of the foregoing, the court finds that the order of the district court should be

and hereby is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

TIMOTHY ELING, PAUL C. JOHNSON, ANTHONY DENT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v. MEMORANDUM ORDER

C. PAUL JONES, Minnesota State Public Defender and STATE OF MINNESOTA,

Defendants.

Thomson & Hawkins, by DEBORAH ELLIS, St Paul, Minnesota, appeared for plaintiffs.

Hubert H. Humphrey, III, Attorney General, State of Minnesota, by MARK B. LEVINGER, Special Assistant Attorney General, St. Paul, Minnesota, appeared for defendants.

The above-entitled matter came before the undersigned on the 9th day of

August, 1985, upon the motion of defendants for summary judgment pursuant to Fed. R. Civ. P. 56.

The plaintiffs in this case are three prisoners, each of whom was represented by the Minnesota State Public Defender's office. The plaintiffs seek declaratory and injunctive relief on behalf on themselves and a class of "all persons convicted in Minnesota who have been or are now represented by the state public defender on appeal of their conviction or sentence." The plaintiffs allege that the State Public Defender, C. Paul Jones, has denied them an opportunity to review their trial transcripts before appeal briefs were written and has denied them access to their trial transcripts after the appeals have been decided. The plaintiffs bring this

action pursuant to 42 U.S.C. § 1983 and assert that these acts by the public defender violate their rights protected by the sixth and fourteenth amendments to the United States Constitution and by Article I, Section 6, of the Minnesota State Constitution. The plaintiffs seek declaratory and injunctive relief which would require the public defender to allow plaintiffs access to trial transcripts while an appeal is pending and requiring defendants to provide trial transcripts upon request to indigent persons whose appeals have been decided in state court and for whom no further state post-conviction relief can be sought.

The plaintiffs point out that in Minnesota, when trial transcripts are required for an appeal of a state conviction, the court reporter prepares

four copies. The reporter files the original and one copy of the transcript with the clerk of the appellate courts, provides one copy to the prosecuting authority, and provides one copy to defendant's counsel. After the appeal is completed, it is the practice for the public defender's office to retain the trial transcript in their files.

The public defender asserts that after an appeal, the transcript is kept to be used for post-sentence applications for relief, for responding to inquiries from clients or former clients, and, in the proper cases, for federal habeas corpus proceedings. On the other hand, plaintiffs point out that the transcripts which they are seeking have already been prepared, used, and are, for all practical purposes, useless to the public

defender. The plaintiffs further assert that, even if the public defender has some basis for retaining the transcripts, the right of the indigent inmate to have his or her trial transcript after appeal is superior to that of the public defender.

The plaintiffs bring this action pursuant to 42 U.S.C. § 1983 for deprivation of their civil rights arising under the sixth and fourteenth amendments to the United States Constitution. Jurisdiction is authorized and conferred upon this court pursuant to 28 U.S.C. §§ 1331 and 1343.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia, subjects or causes to be subjected, any person of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunites secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, inequity, or other improper proceeding for redress.

There are two essential elements to any § 1983 cause of action: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunites secured by the Constitution or laws of the United States." Parratt v. Taylor, 451 U.S. 527, 535 (1981).

The United States Supreme Court has defined when a person is acting "under color of state law" as the " . . . misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with

the authority of state law." United States v. Classic, 313 U.S. 299, 326 (1941). Although this definition came in the context of a criminal case, it has been adopted by the Supreme Court for use in § 1983 actions. Monroe v. Pape, 365 U.S. 167, 187 (1961).

The Supreme Court has further defined when a public defender acts under color of state law. The Supreme Court has held that a public defender does not act "under color of state law" when he or she is performing a lawyer's traditional functions as counsel to an indigent defendant in a state criminal proceeding. Polk County, et al. v. Dodson, 454 U.S. 312, 318-19 (1981). The court noted that a public defender, while a state employee, was compelled by his position and by the ethics of the profession to advance the undivided

interest of his client. Id. at 318-24. However, the Supreme Court has also held that a state public defender may act "under color of state law" if they conspire with state officials to deprive their clients of federal rights. Power v. Glover, 104 S. Ct. 2820, 2826 (1985).

This case is clearly controlled by Polk County v. Dodson. Plaintiffs' claims to copies of their state court trial transcripts from the public defender clearly relates to the legal representation given to them by the public defender in state criminal proceedings. Plaintiffs have made no allegations nor presented any facts that would indicate that the public defender is engaged in a conspiracy with state officials to deprive them of any constitutional rights. Therefore,

the court concludes that the public defender's refusal to give the plaintiffs their trial transcripts was not done "under color of state law" and the plaintiffs have therefore failed to establish the necessary first element of a § 1983 action.

The plaintiffs have also commenced this action against the State of Minnesota. However, plaintiffs have made no allegations on which to base liability against the State of Minnesota that are separate from the allegations raised against the public defender.

The standards governing summary judgment are well established. Under Fed. R. Civ. P. 56(c), the district court shall render summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Eighth Circuit Court of Appeals has emphasized the drastic nature of the summary judgment remedy, finding it appropriate only if "the moving party has established his right to a judgment with such clarity as to leave no room for controversy and the non-moving party is not entitled to recover under any discernible circumstances." Camfield Lines, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1364 (8th Cir. 1983), quoting Butler v. MFA Life Insurance Co., 591 F.2d 448, 451 (8th Cir. 1979). All evidence must be viewed in the light most favorable to the non-moving party. Adickes v. S.H.

Cress & Co., 398 U.S. 144, 158-59 (1970). The court must give the non-moving party the benefit of all reasonable inferences to be drawn from the underlying facts. Trnka v. Elanco Products Co., 709 F.2d 1223, 1225 (8th Cir. 1983).

Summary judgment is an appropriate remedy in this case. As noted above, plaintiffs have failed to establish the necessary first element of a § 1983 claim. Therefore, defendants are entitled to summary judgment as a matter of law.

Based upon the record as it is presently constituted, the memoranda of law that have been submitted by the parties, the arguments of counsel, and all files and records herein, the court makes the following order.

IT IS ORDERED

1. That the motion of the defendants for summary judgment pursuant to Fed. R. Civ. P. 56 is in all things granted.

2. That the clerk enter judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED That plaintiffs' complaint is dismissed with prejudice.

DATED: September 3, 1985

DONALD D. ALSOP
United States
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 85-5353-MN

Timothy Eling, et al.,	*	
	*	Appeal from
Appellants,	*	the United
	*	States District
vs.	*	Court for the
	*	District of
C. Paul Jones, etc., et al.,	*	Minnesota
	*	
	*	
Appellees.	*	

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

September 8, 1986

No. 86-926

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TIMOTHY ELING, et al.,

Petitioners,

v.

C. PAUL JONES, Minnesota Public Defender,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a state public defender acts under color of state law within the meaning of 42 U.S.C. § 1983 when he refuses a request by a client to provide the client with the defender's only copy of the transcript of that client's trial after direct appeals of that client's conviction have been exhausted when that refusal is based upon the public defender's opinion that the transcript may be needed in the future for post-sentencing applications for relief or other legal representation of that client.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-926

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent C. Paul Jones, Minnesota Public Defender, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 797 F.2d 697 and is reproduced in Appendix A to the petition.

STATEMENT OF THE CASE

Respondent, C. Paul Jones, the Minnesota Public Defender, is the administrative head of the Office of the Minnesota State Public Defender. Minn. Stat. § 611.22 (1986). Jones was appointed to that position by the Minnesota State Board of Public Defense, an agency committed to maintaining a high quality, independent public defense system in Minnesota. Minn. Stat. §§ 611.215 and 611.23 (1986). The Office of the State Public Defender operates as an independent agency of government in Minnesota which is able to represent its clients' interest without interference from other state officials or agencies. Aff. of C. Paul Jones, ¶ 2 (Jt. App., App. E).[1]

Each of the petitioners was represented at trial by an Assistant County Public Defender. Aff. of Anthony Dent, ¶ 3 (Jt. App., App. I); Aff. of Paul C. Johnson, ¶ 3 (Jt. App., App. J); Aff. of Timothy Eling, ¶ 3 (Jt. App., App. L). These county public defender offices are independent from the Office of the State Public Defender. Minn. Stat. § 611.12 (1986).

After conviction each of the three petitioners was represented on appeal by C. Paul Jones and the Office of the State Public Defender. That representation involved interviewing the petitioner, ordering the trial transcript, and preparing an appellate brief. In addition, Mr. Eling filed his own *pro se* supplemental brief with the Minnesota Supreme Court. Aff. of C. Paul Jones, ¶¶ 4B, 4C (Jt. App., App. E).

Each of the three petitioners' criminal convictions was upheld by the Minnesota Supreme Court. In the professional opinion of respondent Jones, the Supreme Court's decisions foreclosed any further non-frivolous legal proceedings on be-

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[1] All factual references contained herein will be to the Joint Appendix submitted by the parties to the Eighth Circuit Court of Appeals.

half of each petitioner. Aff. of C. Paul Jones, ¶¶ 4G, 5E, 6C (Jt. App., App. E).

Each of the three petitioners has requested a free copy of his trial transcript from the Office of the State Public Defender. Mr. Eling requested copies of his trial transcript both before the decision of the Minnesota Supreme Court was rendered (but after all briefs had been submitted) and after that decision had been rendered. Eling did not state any specific reason for wanting a copy of his transcript. Aff. of C. Paul Jones, ¶¶ 4D, 4G (Jt. App., App. E).

Petitioner Johnson requested a copy of all documents relating to his case, including trial transcripts, before the transcript was prepared. The Office of the State Public Defender has no records indicating that Johnson ever again requested a copy of his trial transcript. Aff. of C. Paul Jones, ¶¶ 5, 5C, 5F (Jt. App., App. E).

Petitioner Dent requested a copy of his trial transcript, indicating that he wished to complain about ineffective assistance of counsel at trial. An Assistant State Public Defender responded that, in light of the fact that the Minnesota Supreme Court had found the evidence against Dent to be "overwhelming", Dent's claim of ineffective assistance of counsel at the trial did not present an issue which was not frivolous. Aff. of C. Paul Jones, ¶ 6D (Jt. App., App. E). Dent next wrote to Mr. Jones stating that he had been asked by Magistrate Brian Short of the United States District Court in Minnesota to write to Jones to obtain transcripts of Dent's grand jury indictment and trial. Jones replied that such records would be provided to the federal court if they were requested by that court. No such request was ever received by the Office of the State Public Defender. Aff. of C. Paul Jones, ¶ 6E (Jt. App., App. E).

The Office of the State Public Defender, as part of its representation of indigent defendants, will order a trial transcript when necessary to present any significant, non-frivolous issue to state appellate or post-conviction courts, and to federal courts. Aff. of C. Paul Jones, ¶ 7 (Jt. App., App. E); Supp. Aff. of C. Paul Jones, ¶ 5 (Jt. App., App. M). Respondent Jones has two main reasons for not providing a defendant with Jones' only copy of the trial transcript after the defendant's conviction has been affirmed by the Minnesota Supreme Court. First, Jones' office has represented hundreds of such inmates in applications for post-sentence relief pursuant to Minn. Stat. § 590.01, subd. 3 (1986). In connection with many of these applications, it has been necessary to review trial transcripts. There is a continuing possibility of such post-sentence applications for relief because of potential modifications in the state determinate sentencing guidelines which may have retroactive applicability. Supp. Aff. of C. Paul Jones, ¶ 1A (Jt. App., App. M).

Second, the Office of State Public Defender needs the transcripts to respond to direct inquiries to the Office concerning its handling of the case or other aspects of the case. Often these inquiries, which can occur as long as several years after the appeal has ended, necessitate a review of portions of the trial transcript. Supp. Aff. of C. Paul Jones, ¶ 1B (Jt. App., App. M).

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari should be denied because petitioners have failed to show that there are "special and important reasons" for this Court to grant such discretionary review. An examination of the issue presented in the petition in light of the reasons set forth in Supreme Court Rule 17 illustrates the lack of any "special and important reasons" for review to be granted.

Although petitioner has not cited to any of the specific criteria set forth in Rule 17.1, it would appear that only Rule 17.1(c) is arguably applicable.[2] However, the decision of the Court of Appeals neither "decided an important question of federal law which has not been, but should be, settled by this Court," nor "decided a federal question in a way in conflict with applicable decisions of this Court."

This case does not present an important, unsettled question of federal law. The law is settled that a public defender does not act "under color of state law" when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981). The ethical obligations of the public defender to his client, and the constitutional obligation of the State to respect the professional independence of its public defenders, provides suf-

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[2] Rule 17.1(a) is not applicable because the petition does not present an instance in which there is a conflict amongst the federal courts of appeal or between the decision of which review is sought and the decision of a state court of last resort. The petition also does not claim that the decision of the Court of Appeals in this matter has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision." Rule 17.1(b) is also inapplicable.

ficient assurance that public defenders' actions taken within their role as counsel are free from state control. *Id.* at 321-22.

On the other hand, a public defender acts "under color of state law" when making hiring and firing decisions on behalf of the State, actions not subject to that defender's ethical obligations to any client. *Id.* at 325, citing *Branti v. Finkel*, 445 U.S. 507 (1980). As the court below correctly pointed out, *Branti* involved a public defender acting in an employer/employee relationship. In contrast, this case involves the public defender acting in an attorney/client relationship, as was the situation in *Dodson*. 797 F.2d at 699 (A-6).

Petitioners do not seek to have this Court answer any unsettled question of law, but merely to review factual findings of the district court which compelled the conclusion that *Dodson* was the controlling case. Petitioners first claim that review should be granted because the district court improperly granted summary judgment. Specifically, petitioners claim that "[T]he district court erroneously found as a matter of fact that respondent performed a lawyer's traditional function [when denying the petitioners respondent's only copy of the trial transcript] and therefore was immune from liability under Title 42 United States Code Section 1983." Pet. at 12.

Petitioners' second argument is merely a restatement of the first argument. Petitioners argue that, in the instant case, C. Paul Jones was performing an administrative and not a lawyering function when he decided not to provide trial transcripts to petitioners after the appeal was concluded. Pet. at 13-14. Once again, petitioners are merely stating a challenge to the factual findings of the district court that Jones was performing a lawyer's traditional function when he concluded that the potential need of the trial transcripts for post-sentence applications for relief and for responding to inquiries necessitated his office keeping the trial transcript.

See Supp. Aff. of C. Paul Jones, ¶ 1 (Jt. App., App. M). Petitioners are not contending that this Court need answer an important, unsettled question of federal law, but rather to review the facts as found by the district court and as applied to settled case law.

The Court of Appeals' decision is not in conflict with any decisions of this Court. The decision does not, as claimed by petitioners, "ignore the teachings of *Dodson* that a public defender 'would act under color of state law while performing certain *administrative* and possibly investigative functions.' 454 U.S. at 325 (emphasis added)." Pet. at 16. First, the quoted statement from *Dodson* is not a "teaching" of *Dodson*. In fact, *Dodson* explicitly leaves open the question of whether a public defender would act under color of state law while performing certain administrative or investigative functions which do not fall within a lawyer's traditional functions as counsel to a defendant in a criminal proceeding. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981). Second, the decision below is totally consistent with *Dodson* in that it held that Jones' exercise of "independent professional judgment in a criminal proceeding" brought the case squarely within the holding of *Dodson*. 797 F.2d at 699 (A-6).

Petitioners also argue that the Eighth Circuit Court of Appeals, in finding *Tower v. Glover*, 467 U.S. 914 (1984) inapplicable, read *Tower* too narrowly. Pet. at 15-16. In fact, the Court of Appeals correctly held that *Tower* was inapplicable because petitioners had not alleged a conspiracy in this matter between C. Paul Jones and other state officials. 797 F.2d at 699 (A-5). The unambiguous holding of *Tower* is that a public defender who is alleged to have conspired with state officials to deprive another of federal rights has acted "under color of state law." 467 U.S. at 923. Thus, the Court of Appeals' decision does not conflict with *Tower*.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari because the decision of the Eighth Circuit Court of Appeals simply affirmed a factual finding of the district court. The proposed question for review does not pose an important, unsettled question of federal law. The Court of Appeals' decision does not conflict with the controlling decisions of this Court. Accordingly, respondent C. Paul Jones respectfully requests that this Court deny the petition.

Respectfully submitted,

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